TIO CHEE HING

v.

UNITED OVERSEAS BANK (MALAYSIA) BHD

FEDERAL COURT, PUTRAJAYA
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
HASAN LAH FCJ
ZALEHA ZAHARI FCJ
JEFFREY TAN FCJ
[CIVIL APPLICATION NO: 08-288-2011(S)]
16 JANUARY 2013

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Preliminary objection - Appeal to High Court in relation to decision of Director of Land and Survey - Dismissal of appeal by High Court and Court of Appeal - Whether High Court heard matter in exercise of its original jurisdiction - Whether High Court merely acting in its appellate jurisdiction - Preconditions for leave to appeal to Federal Court - Whether satisfied - Whether application for leave to appeal to Federal Court to be struck out - Courts of Judicature Act 1964, s. 96(a) - Land Ordinance (Sabah Cap 68), s. 41*

The respondent had granted banking and overdraft facilities to the applicant. Due to the applicant's failure to service the facilities, the respondent went before the Assistant Commissioner of Land Revenue ('ACLR') for an order of sale in relation to all the lands charged by the applicant to secure the said facilities. Pursuant to s. 111 of the Land Ordinance (Sabah Cap 68) ('Ordinance'), the ACLR proceeded with the hearing of the land enquiries and issued orders for sale of the charged lands. On appeal, the Director of Land and Survey dismissed the applicant's appeal. Similarly, both the High Court and Court of Appeal dismissed the applicant's appeal. By virtue of s. 96(a) of the Courts of Judicature Act 1964 ('CJA'), the applicant filed an application for leave to appeal to the Federal Court *vide* encl. 2(a) against the decision of the Court of Appeal and thereafter, proceeded to file encl. 21(a) which included, *inter alia*, a prayer that the respondent's counsel be disqualified from representing the respondent in related legal proceedings inclusive of the proceedings in these two enclosures. However, in relation to the leave application, the respondent

raised its preliminary objection on the following grounds, *ie*, (i) that the impugned decision was not made by the High Court in the exercise of its original jurisdiction and therefore, a requirement of s. 96(a) of the CJA was not met; and (ii) that the impugned decision was not appealable beyond the High Court under s. 41 of the Ordinance. In light of this, the respondent submitted that as the High Court was hearing an appeal from the Director of Land and Survey under s. 41(1) of the Ordinance, it was thus acting in its appellate jurisdiction and not in its original jurisdiction. As such, it was the respondent's contention that since the fundamental requirement under s. 96(a) of the CJA was not met, hence, encls. 2(a) and 21(a) must be struck out.

Held (upholding preliminary objection; striking out encls. 2(a) and 21(a))

Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) Article 128(3) of the Federal Constitution clearly states that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, High Court or a judge thereof shall be such as maybe provided by the federal law. For civil matters, the Federal Court's jurisdiction to hear appeals is governed by s. 96(a) of the CJA. (para 15)

(2) Section 96(a) of the CJA requires that before the Federal Court hears an appeal from the Court of Appeal, leave must first be obtained from the Federal Court. The pre-conditions to be satisfied are: (i) that the judgment or order handed down by the Court of Appeal must be in respect of an appeal heard by it; and (ii) that the appeal heard by the Court of Appeal must emanate from a decision decided by the High Court in exercise of its original jurisdiction. (para 34)

(3) Section 41 of the Ordinance clearly legislates that an appeal shall lie from any order or decision of the Director, whether original or an appeal, to the "court" and s. 4 of this Ordinance provides that "court" means the "High Court". Certainly it bars the High Court from exercising an original jurisdiction thus leaving it only with an appellate jurisdiction. In the instant case, since the High Court was not hearing the matter in exercise of its original jurisdiction, encls. 2(a) and 21(a) could not stand and thus, were struck out. (paras 33 & 36)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah memberikan kemudahan bank dan overdraf kepada pemohon. Akibat kegagalan pemohon untuk membayar kemudahan tersebut, responden telah memohon kepada Penolong Pemungut Hasil Tanah ('PPHT') bagi suatu perintah jualan berkenaan kesemua tanah yang digadai oleh pemohon bagi membiayai kemudahan tersebut. Berikutan peruntukan s. 111 Ordinan Tanah (Sabah Cap 68) ('Ordinan'), PPHT telah mendengar siasatan tanah dan mengeluarkan perintah penjualan tanah-tanah yang digadai tersebut. Atas rayuan, Pengarah Tanah dan Ukur telah menolak rayuan pemohon. Mahkamah Tinggi dan Mahkamah Rayuan juga telah menolak rayuan pemohon. Berdasarkan s. 96(a) Akta Kehakiman Mahkamah 1964 ('Akta'), pemohon telah memfailkan permohonan bagi kebenaran merayu ke Mahkamah Persekutuan melalui lampiran 2(a) terhadap keputusan Mahkamah Rayuan dan selepas itu, memfailkan lampiran 21(a) dengan memohon, antara lain, bahawa peguam responden tidak layak untuk mewakili responden dalam prosiding undang-undang berkaitan termasuk prosiding bagi kedua-dua lampiran di sini. Walau bagaimanapun, bagi permohonan untuk kebenaran, responden telah membangkitkan bantahan awal berdasarkan alasan-alasan berikut, iaitu, (i) bahawa keputusan yang dipertikaikan tidak dibuat oleh Mahkamah Tinggi dalam pelaksanaan bidang kuasa asalnya dan oleh itu, kehendak di bawah s. 96(a) Akta telah tidak dipatuhi; dan (ii) bahawa keputusan tersebut tidak boleh dirayu melebihi Mahkamah Tinggi di bawah s. 41 Ordinan. Berdasarkan ini, responden menghujahkan bahawa memandangkan Mahkamah Tinggi mendengar rayuan daripada Pengarah Tanah dan Ukur di bawah s. 41(1) Ordinan, ia telah bertindak dalam bidang kuasa rayuannya dan bukan dalam bidang kuasa asalnya. Oleh itu, adalah menjadi hujahan responden bahawa memandangkan kehendak penting di bawah s. 96(a) Akta tidak dipatuhi, maka lampiran 2(a) dan lampiran 21(a) mesti dibatalkan.

Diputuskan (membenarkan bantahan awal; membatalkan lampiran 2(a) dan lampiran 21(a))
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Perkara 128(3) Perlembagaan Persekutuan jelas memperuntukkan bahawa bidang kuasa Mahkamah Persekutuan untuk mengendalikan rayuan daripada Mahkamah Rayuan, Mahkamah Tinggi atau seseorang hakim hendaklah seperti yang

diperuntukkan oleh undang-undang persekutuan. Bagi perkara-perkara sivil, bidang kuasa Mahkamah Persekutuan untuk mendengar rayuan tertakluk di bawah s. 96(a) Akta.

(2) Seksyen 96(a) Akta memperuntukkan bahawa sebelum Mahkamah Persekutuan mendengar suatu rayuan daripada Mahkamah Rayuan, kebenaran mesti diperolehi daripada Mahkamah Persekutuan. Pra-syarat untuk dipatuhi adalah: (i) bahawa penghakiman atau perintah yang diberikan oleh Mahkamah Rayuan mestilah daripada rayuan yang didengar olehnya; dan (ii) bahawa rayuan yang didengar oleh Mahkamah Rayuan mestilah bermula daripada suatu keputusan yang diputuskan oleh Mahkamah Tinggi dalam pelaksanaan bidang kuasa asalnya.

(3) Seksyen 41 Ordinan jelas menyatakan bahawa suatu rayuan boleh berbangkit daripada perintah atau keputusan Pengarah, sama ada secara asal atau rayuan, kepada "mahkamah" dan s. 4 Ordinan menyatakan bahawa "mahkamah" bermaksud "Mahkamah Tinggi". Jelas, ianya menghalang Mahkamah Tinggi daripada melaksanakan bidang kuasa asalnya dan oleh itu, hanya memberikannya bidang kuasa rayuan. Dalam kes di sini, memandangkan Mahkamah Tinggi tidak mendengar tindakan ini dalam melaksanakan bidang kuasa asalnya, lampiran 2(a) dan lampiran 21(a) tidak boleh dikekalkan dan dengan itu, dibatalkan.

Case(s) referred to:

Burhan Ating & Ors v. Directors of Lands & Surveys & Ors [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 HC ***(refd)***

Cheong Seok Leng v. PP [1988] 1 LNS 39 HC ***(refd)***

Chung Khiaw Bank Ltd v. Tio Chee Hing [1987] 1 CLJ 531; [1987] CLJ (Rep) 81 SC ***(refd)***

Chung Khiaw Bank (Malaysia) Bhd v. Tio Chee Hing [2004] 3 CLJ 59 CA ***(refd)***

Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors [2011] 6 CLJ 733 CA ***(refd)***

G Pattedar v. Mahaboob AIR 2005 Kant 377 ***(refd)***

Ismail Hj Yunus & 2 Ors (For Themselves and On Behalf of 300 Ors v. Syarikat Kerjasama Perkembangan Tanah Pagagau Berhad & Anor [1994] 4 CLJ 701 HC ***(refd)***

Koperasi Jimat Cermat Dan Pinjaman Keretapi Bhd v. Kumar Gurusamy [2011] 3 CLJ 241 FC ***(refd)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No. 08-31-99(S)) (Unreported) ***(refd)***

Lau Keen Fai v. Lim Ban Kay & Anor [2012] 1 CLJ 569 FC ***(refd)***

Nagendra Nath v. Suresh AIR 1932 PC 165 ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 FC ***(refd)***
Tan Weng Chiang v. PP [1992] 4 CLJ 2094; [1992] 1 CLJ (Rep) 324 SC ***(refd)***
Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party) [2011] 7 CLJ 401 FC ***(refd)***

Legislation referred to:
Co-operative Societies Act 1993, ss. 4, 83(1)
Courts of Judicature Act 1964, ss. 3, 22, 23, 24, 25A, 26, 27, 28, 29, 30, 96(a)
Federal Constitution, art. 128(3)
Income Tax Act 1967, ss. 41, 42
Land Ordinance (Sabah Cap 68), ss. 4, 41, 111
Legal Profession Act 1976, s. 103E
Subordinate Courts Act 1948, s. 3

For the appellant - Firoz Hussein (Pg Amli Ndhin with him); M/s Nohin & Partners
For the respondents - Cyrus Das (Frederick Pang with him); M/s Peter Lo & Co

[Appeal from Court of Appeal; Civil Appeal No: S-02-283-2005]

Reported by Kumitha Abd Majid

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] This judgment relates to a preliminary objection raised by the defendant, hereinafter referred to as the respondent, regarding a leave application (encl. 2(a)) under s. 96(a) of the Courts of Judicature Act 1964 (the CJA) filed by the plaintiff (applicant). The leave application is against the decision of the Court of Appeal handed down on 16 June 2011.

[2] A couple of weeks after the filing of encl. 2(a), the applicant filed encl. 21(a). Enclosure 21(a) has several prayers inclusive of the prayer for an order that the hearing of encl. 2(a) be stayed, that the view of Gopal Sri Ram JCA (as he then was) in *Chung Khiaw Bank (Malaysia) Bhd v. Tio Chee Hing* [2004] 3 CLJ 59 delivered on 9 April 2004 be adjudicated as having no effect and that the order of the Court of Appeal delivered through him be

set aside, and further that the respondent's counsel be disqualified from representing the respondent in related legal proceedings inclusive of the proceedings in these two enclosures.

[3] The court fixed these two enclosures of 2(a) and 21(a) to be heard on 5 July 2012 on which date this panel was confronted by a preliminary objection raised by the respondent. Parties agreed that if the preliminary objection were allowed then encls. 21(a) and 2(a) would be dismissed; otherwise the hearing of both applications would be heard on their merits. On that understanding we proceeded to hear the preliminary objection.

[4] To appreciate what led to the preliminary objection the facts of the case must be unfolded first.

Facts Of The Case

[5] The applicant was a business man and owned or controlled three companies namely Southern Light Trading Co, Toa Kigyo Co Sdn Bhd and Southern Estates Sdn Bhd. He also was the registered proprietor of 13 pieces of land located at Lahad Datu, Sabah. For his business, banking and overdraft facilities were granted to him by the respondent, previously known as Chung Khiaw Bank. In 1967, a facility of RM1,000,000 was granted to the applicant, secured by a piece of land, and registered on 30 September 1967 as Memorial 90041. Another facility for RM400,000 obtained in 1967 was registered as Memorial 92664 and a third for RM1.4 million was registered as Memorial 92666.

[6] As the two facilities of 1967 (secured by Memorial 90041 and Memorial 92664) were not properly serviced, the respondent initiated two court proceedings at the High Court against the applicant. Judgments in default of appearance were entered in both suits and no appeal was filed against them.

[7] The third facility suffered the same fate when it was also not serviced, but this time it was disputed by the applicant unlike the above two facilities. According to the applicant he applied for and obtained an overdraft facility of RM1.4 million in 1968 in order to discharge Memorial 90041. To secure the RM1.4 million facility, 11 pieces of land were charged. The applicant on the other hand, despite agreeing that the facility was granted, disputed that the RM1.4 million was ever disbursed to him. The respondent argued otherwise, and alluded to the two cases of *Chung Khiaw Bank (Malaysia) Bhd v. Tio Chee Hing* (*supra*) and *Chung Khiaw Bank*

Ltd v. Tio Chee Hing [1987] 1 CLJ 531; [1987] CLJ (Rep) 81, to prop up its argument. We will not discuss the issue of disbursement in much detail as it falls within the prayers to be ventilated on the merits of encls. 21(a) and 2(a), should the preliminary objection raised not be upheld if and when necessary. Suffice it to say that Gopal Sri Ram acquiescing to the factual finding of the earlier case of *Chung Khiaw Bank Ltd v. Tio Chee Hing* [1987] 1 CLJ 531; [1987] CLJ (Rep) 81 opined that the matter was *res judicata*. This view was likewise held by Ian HC Chin J when the matter came up before him for adjudication.

[8] Returning to the general mainstream, the applicant conceded that as the respondent had obtained judgments for the facilities under Memorials 90041 and 92664, and as he was also alleged to have failed to service the facility secured by Memorial 92666, the respondent went before the Assistant Commissioner of Land Revenue (ACLR) for an order of sale for all the lands charged under those three memorials pursuant to r. 14 of the Land Rules. Rule 14 reads:

> 14. Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector.

[9] The reference numbers of the land enquiries before the ACLR for Memorials 92666, 90041 and 92664 are Land Enquiry No 3/80 (LE 3/80), Land Enquiry 4/80 (LE 4/80) and Land Enquiry No. 5/80 (LE 5/80) respectively.

[10] The ACLR proceeded with the hearing of the land enquiries pursuant to s. 111 of Sabah Land Ordinance (Cap 68) and after its completion issued orders for sale of the charged lands. The applicant being dissatisfied, filed appeals only against the decisions relating to Memorials 92666 and 90041 (LE 3/80 and LE 4/80 respectively) to the Director of Land and Survey but lost both appeals. Still not satisfied, the applicant proceeded to file an appeal to the High Court *vide* Appeal No. 1/1981 pertaining to both memorials. After a chequered history, Ian HC Chin J who heard the appeal, dismissed it by ruling that the matter was *res judicata*, ie, after having taken into consideration the two cases on the issue of disbursements, namely *Chung Khiaw Bank Ltd v. Tio Chee Hing* [1987] 1 CLJ 531; [1987] CLJ (Rep) 81 and *Chung Khiaw Bank (Malaysia) Bhd v. Tio Chee Hing* [2004] 3 CLJ 59. Being dissatisfied the applicant filed an appeal to the Court of Appeal but similarly failed.

A **The Procedural Route Undertaken From The ACLR To The Court Of The Appeal**

[11] The matter of the facilities secured by the three memorials filed with the ACLR (LE 3-5), and culminating with a ruling against the applicant, was a matter that fell under s. 111 of the Sabah Land Ordinance (Cap 68). This provision reads:

> 111. If default be made in the payment of the principal sum, interest or periodical payment or any part thereof secured by a charge, or in the observance of any agreement express or implied in such charge, it shall be lawful for the Collector, on the application of the chargee and on being satisfied that such default has been made and has continued for the space of one month after the notice has been served by the chargee upon the chargor, in accordance with rules hereunder to order the sale by auction of the whole or any part of the land comprised in the charge.

[12] The appeal from the ACLR to the Director of Land and Survey is provided for under s. 41 of the Sabah Land Ordinance (Cap 68). It reads:

> 41. (1) An appeal shall lie from any order or decision of a Collector, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court:
>
> Provided that no appeal shall be admitted:
>
> (2) Except as herein expressly provided, no Court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to a Collector or the Director.

The Preliminary Objection

[13] Before us the respondent made a twofold preliminary objection on the following grounds:

(a) that the impugned decision was not made by the High Court in the exercise of its original jurisdiction, and therefore a requirement of s. 96(a) of the CJA was not met; and

(b) that the impugned decision was not appealable beyond the High Court under s. 41 of the Sabah Land Ordinance (Cap 68).

[14] It is this court's view that if the respondent succeeds with the first ground of objection the need to consider the second objection does not arise; otherwise the second ground is proceeded with.

[15] The jurisdiction of the Federal Court to hear any appeal is governed by art. 128(3) of the Federal Constitution which clearly states that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, High Court or a judge thereof shall be such as may be provided for by the federal law. For civil matters, the Federal Court's jurisdiction to hear appeals is governed by s. 96(a) of the CJA. This provision reads:

> 96. Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) From any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
>
> (b) From any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[16] Here the respondent disputed that the decision of the High Court was pursuant to an exercise of its original jurisdiction. The respondent submitted that as the High Court was hearing an appeal from the Director of Land and Survey under s. 41(1) of the Sabah Land Ordinance (Cap 68) it was thus acting in its appellate jurisdiction and not its original jurisdiction. On that premise the respondent canvassed that a fundamental requirement of s. 96(a) of the CJA was not satisfied and the two enclosures must be struck out forthwith.

[17] In the scheme of the CJA, a distinction is made between an appellate jurisdiction and an original jurisdiction. The term 'original jurisdiction', is a reference to 'the jurisdiction to entertain cases in the first instance as distinguished from appellate jurisdiction' (Aiyar's *Major law Lexicon* (2010 edn.) vol. 4 4828-29; see also *G Pattedar v. Mahaboob* AIR 2005 Kant 377). Matters relating to the original jurisdiction of the High Court, ie, of matters first

commenced by it are found in ss. 22 to 25A of the CJA (*Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565). Whilst for its appellate jurisdiction, the ordinary meaning suggesting the correction of a decision, causing it to be set aside pursuant to a filing of a notice of appeal by an aggrieved party, ss. 26 to 30 of the CJA are relevant (*Nagendra Nath v. Suresh* AIR 1932 PC 165). Under ss. 26-28 of the CJA the High Court exercises appellate jurisdiction in hearing appeals from subordinate courts. Subordinate court is defined as "any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court (s. 3 of the CJA)". Given the differentiation between the two jurisdictions we shall not discuss this matter any further. Suffice it to say that even the table of contents has delineated the differences.

[18] In support of his submission that the High Court had not exercised its original jurisdiction, the respondent's counsel drew our attention to two conflicting decisions of this court, namely *Koperasi Jimat Cermat Dan Pinjaman Keretapi Bhd v. Kumar Gurusamy* [2011] 3 CLJ 241, decided by Arifin Zakaria, CJ (Malaya) (as he then was) and *Yong Teng Hing v. Walton International Ltd; Pendaftar Cap Dagang, Malaysia (Interested Party)* [2011] 7 CLJ 401 ("Walton International"), decided by Richard Malanjum, CJSS for consideration. Needless to say, counsel for the respondent vigorously submitted that we should follow the path and reasoning of *Koperasi Jimat Cermat And Pinjaman Keretapi Bhd v. Kumar Gurusamy (Koperasi Jimat Cermat)*.

Koperasi Jimat Cermat

[19] The facts of *Koperasi Jimat Cermat* are as follows. The applicant at all material times was a cooperative society registered under s. 4 of the Co-operative Societies Act 1993 ("the CSA"). The respondent was the vice president of the co-operative society until his membership was terminated by the applicant. He commenced action against the applicant before the Co-operative Tribunal, established under s. 83(1) of the CSA ("the tribunal"), challenging the validity of his termination. The tribunal found that the termination of his membership was made in breach of the rule of natural justice and ordered that the respondent's membership be reinstated. Aggrieved, the applicant filed an appeal against the award of the tribunal to the High Court. The High Court allowed the applicant's appeal and set aside the whole award of the

tribunal with costs. The respondent then successfully appealed to the Court of Appeal and the tribunal's order was restored. The applicant then filed an application for leave to appeal to the Federal Court.

[20] The respondent at the leave application stage, raised a preliminary objection, the issue of whether in an appeal from the tribunal under the CSA, the High Court was exercising its original jurisdiction or its appellate jurisdiction. On behalf of the respondent it was argued that the High Court was exercising its appellate jurisdiction. That being, so the matter ended at the Court of Appeal and the Federal Court had no jurisdiction to hear the application for leave.

[21] The applicant submitted that the tribunal was not a subordinate court and placed much reliance on s. 3 of the Subordinate Courts Act 1948 ("SCA") and s. 3 of the CJA. We reproduce the two sections in order to follow the argument of the applicant better. They read as follows:

> Section 3 of the SCA:
>
> (2) there shall be established the following Subordinate Courts for the administration of civil and criminal law:
>
> (a) Sessions Courts;
>
> (b) Magistrates' Courts; and
>
> (c) in West Malaysia only, Penghulu Courts.
>
> Section 3 of the CJA. Interpretation.
>
> "Subordinate court" means any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court any such court as by any written law has jurisdiction within the local jurisdiction of the High Court.

[22] Without the need to comprehensively repeat the applicant's argument, suffice if we merely state that the applicant held the view that the tribunal did not fall under any of these provisions. As the tribunal was not a subordinate court, the High Court was thus exercising its original jurisdiction entitling the applicant to appeal to the Federal Court.

[23] Arifin Zakaria CJ (Malaya) (as His Lordship then was) disagreed with the applicant and accordingly struck out the leave application. As distilled at held (1) it was concluded that:

> ... the appeal made by the applicant to the High Court was made pursuant to s. 83(7) CSA and instituted by way of originating motion under O. 55 r. 13 Rules of High Court 1980. The matter thus came before the High Court by way of an appeal and it followed that this application could not come within the ambit of s. 96(a) of CJA. The preliminary objection ... was, therefore upheld.

[24] In the course of his judgment His Lordship agreed with the analysis of the unreported decision of the Federal Court in *Ketua Pengarah Hasil Dalam Negeri v. Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No. 08-31-99(S) (*Syarikat Jasa Bumi*'s case) (unreported). His Lordship adopted the same view that whether a tribunal was a subordinate court or an inferior court was not in issue; the critical issue was whether the High Court was exercising its original jurisdiction or appellate jurisdiction.

[25] In that unreported case of *Syarikat Jasa Bumi*, the decision of the Special Commissioners of Income Tax was appealed to the High Court. The issue for consideration at the Federal Court was whether the High Court was exercising its appellate jurisdiction or original jurisdiction when hearing a tax appeal by way of case stated. Chong Siew Fai, CJSS stated that:

> ... the pertinent question to consider is not so much as to whether the Special Commissioners of Income Tax constituted a subordinate court or an inferior court but rather whether the judgment of the Court of Appeal sought to appeal against is in respect of a cause or matter decided by the High Court in the exercise of its original jurisdiction. In other words, the material point is not so much the status of the Special Commissioners sitting in judgment of the assessment made by the Director General, but rather the nature of the jurisdiction exercised by the High Court when it heard an appeal from the decision of the Special Commissioners by way of case stated.

Walton International

[26] The facts in *Walton International* are as follows. The registrar of Trade Marks had dismissed the respondent's opposition to the appellant's application for registration of a trade mark identified as "GORDANO", which the respondent claimed was similar or

identical to its trade mark "GIORDANO", and which it too claimed to have acquired substantial goodwill and reputation locally and abroad. The respondent appealed to the High Court but lost. The respondent then appealed to the Court of Appeal and eventually won. That led to the appellant's application for leave to appeal to the Federal Court against the judgment of the Court of Appeal.

[27] As in the above case of *Koperasi Jimat Cermat* and the current matter before us, at the hearing of the leave application, the respondent raised a preliminary objection as to the jurisdiction of the Federal Court to grant leave application. The respondent ventilated that the matter originated from the decision of the registrar of Trade Marks, which is a subordinate court, and the High Court thus had heard the matter in its appellate jurisdiction. As the High Court had not heard the matter under its original jurisdiction the leave application should be struck out. The Federal Court disagreed with the respondent and dismissed the preliminary objection and accordingly allowed the leave application to be heard. In gist, Richard Malanjum, CJSS speaking on behalf of the panel took a differing view from that of *Koperasi Jimat Cermat*.

[28] Richard Malanjum, CJSS opined that:

> ... the general rule was that only the sessions court and the magistrates' courts constituted the subordinate courts and the inferior courts. When the High Court heard appeals from tribunals as appeals from the subordinate courts, the exception to the general rule applied as that approach was taken due to the clear provision dictated in the governing legislation.

[29] His Lordship held that:

> Accordingly, the foregoing statutory provisions are clear in that subordinate courts or inferior courts only consist of the Sessions Court, Magistrates' Court and Penghulu Courts (west Malaysia only). The Registrar of Trade Marks is not included.

[30] Amongst other reasons, His Lordship when commenting and distinguishing the case of *Koperasi Jimat Cermat* with *Syarikat Jasa Bumi* (*supra*), cited s. 42 of the Income Tax Act, Schedule 5. He said, justifying the decision of *Syarikat Jasa Bumi*, the latter provision provided the High Court with the appellate jurisdiction

enabling the matter to be treated as an appeal from subordinate courts. His Lordship said it was an exception rather than a general rule. Furthermore, Schedule 5 provides several provisions including sub-s. 41 which reads thus:

> 41. There shall be such rights of appeal from decisions of the High Court on cases stated under paragraph 34 as exist in respect of decisions of the High Court on questions of law in its **appellate civil jurisdiction** (emphasis added)

[31] His Lordship remarked that, as there was no similar provision in the CSA in *Koperasi Jimat Cermat* similar to the Income Tax Act provision in *Syarikat Jasa Bumi*, the Federal Court in *Koperasi Jimat Cermat* should have decided that the High Court was exercising its original jurisdiction. He opined that "in the absence of such an express statutory provision, the general rule would apply whereby the High Court would exercise original jurisdiction when hearing such appeals from statutory bodies or inferior tribunals (p. 430)."

[32] Perusing in particular paras. 25-26 at pp. 415-416 of *Walton International*, in order to determine the jurisdiction of the High Court when hearing a matter, whether original or appellate, it appears that this court is required to undertake an exercise or inquiry of the status of the inferior court in order to categorise it as a subordinate court, from whose decision the matter was brought to the High Court. Regretfully, we are unable to agree with this view as this court was never set up to look into factual matters or to be bogged down by exercises that should have been resolved at the High Court stage.

[33] To fortify our view, s. 41 of the Sabah Land Ordinance (Cap 68) clearly legislates that (similar the Income Tax Act) an appeal shall lie from any order or decision of the director, whether original or an appeal, to the court. Section 4 of this Ordinance provides that "court" means the "High Court". It is succinctly legislated in s. 41 that no court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by the Sabah Land Ordinance (Cap 68) to the director. Certainly it bars the High Court from exercising an original jurisdiction thus leaving it only an appellate jurisdiction (*Darinsok Pangiran Apan & Ors v. Hap Seng Consolidated Bhd & Ors* [2011] 6 CLJ 733; *Burhan Ating & Ors v. Directors of Lands & Surveys & Ors* [1992] 2 CLJ 1203;

[1992] 2 CLJ (Rep) 211; *Ismail Hj Yunus & 2 Ors (For Themselves and On Behalf of 300 Ors v. Syarikat Kerjasama Perkembangan Tanah Pagagau Berhad & Anor* [1994] 4 CLJ 701). This strengthens our view that the issue of the two Memorials was not heard by the High Court in the exercise of its original jurisdiction but rather in the course of an appeal.

[34] To wind it up, s. 96(a) of the CJA requires that before the Federal Court hears an appeal from the Court of Appeal, leave must first be obtained from the Federal Court. Procedurally, for it to grant leave on a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage at least two other intertwining preconditions must be satisfied. The first is that the judgment or order handed down by the Court of Appeal must be in respect of an appeal heard by it. Secondly, this provision also requires that the appeal heard by the Court of Appeal must emanate from a decision decided by the High Court in exercise of its original jurisdiction. The cumbersome exercise of deciding whether a court is an inferior court or not, cannot take precedence over what is statutorily demanded by s. 96 of the CJA. These are statutory requirements that must be adhered to unless exceptions are granted by law (see s. 103E Legal Profession Act 1976; *Lau Keen Fai v. Lim Ban Kay & Anor* [2012] 1 CLJ 569).

[35] The words in s. 96(a) are unambiguous, plain and clear and thus must be given their natural and ordinary meaning. It is not for us to invent fancy ambiguities as an excuse not to give effect to its plain meaning or twist and stretch the language beyond its common usage (*PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; *Tan Weng Chiang v. PP* [1992] 4 CLJ 2094; [1992] 1 CLJ (Rep) 324; *Cheong Seok Leng v. PP* [1988] 1 LNS 39). We agree with the views held by this court that, regardless of the status of the tribunal, and in this case the Director of Land Survey, whether it is a subordinate court or an inferior court or not, the critical issue is whether the High Court was exercising its original jurisdiction or appellate jurisdiction when hearing the matter (*Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559).

A **[36]** We therefore hold the view that pursuant to the provisions of the Sabah Land Ordinance (Cap 68), which is the governing law regarding the matter before us, as the High Court was not hearing the matter in exercise of its original jurisdiction, encls. 2(a) and 21(a) cannot stand and are thus struck out. With the above
B reason being sufficient to uphold the preliminary objection the second fold argument raised by the respondent is thus redundant.

[37] We now call upon parties to submit on costs.

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